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In The

Supreme Court Of The United States

OCTOBER TERM 1958

PEARL HOLEMAN, Administratrix of the Estate of Floyd Holeman, ... *Petitioner*

V.

LOUISVILLE & NASHVILLE R. R. Co. . . . *Respondent*

and

PEARL HOLEMAN . . . . . *Petitioner*

V.

LOUISVILLE & NASHVILLE R. R. Co. . . . *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

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Opinion of The Court of Appeals of Kentucky.

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States.

The Petition of Pearl Holeman individually and as administratrix of the estate of Floyd Holeman, deceased, respectfully shows:

THE OPINION BELOW

The opinion of the Court of Appeals of Kentucky was delivered October 3, 1958, and the Petition for Rehearing was overruled on January 16, 1959. The opinion is reported in 319 S. W. 2nd. 47, and a copy thereof is appended hereto.

JURISDICTION OF THE COURT

Jurisdiction of the Court is invoked under the provisions of 28 U. S. C. A. 1257 (3).

THE QUESTION PRESENTED FOR REVIEW

(a) Were the passes issued to the decedent Floyd Holeman and his wife Pearl Holeman "mere gratuities" or "matters of charity" within the provisions of the Hepburn Act 49 U. S. C. A. 1 (7).

(b) Were the waiver of liability provisions which were printed on the passes valid under the facts of this case.

(c) Should the Court follow the rule announced in the majority opinion in Francis v. Southern Pacific Co. (1948) 333 U. S. 444, 92 L. Ed. 798, to the effect that federal law controls the validity of waiver provisions on free passes or should the Court now adopt the view expressed in the minority opinion in that case, that since Erie R. Co. v. Tomkins 304 U. S. 64, the question is one of state law.

These questions were raised in the trial court by respondent's motion for a directed verdict. The questions were raised by Petitioner's brief in the Appellate Court and were determined adversely to Petitioner in both instances.

STATEMENT OF THE CASE

Floyd Holeman was killed and Pearl Holeman sustained permanent injuries as a result of the derailment of L. & N. passenger train No. 98 near Nashville, Tennessee, on July 3, 1954.

Mr. and Mrs. Holeman were interstate passengers northbound from New Orleans to Louisville, each traveling on a pass which contained a waiver of liability: "The person accepting and using it thereby assumes all risk of accident to person or property . . . "

Pearl Holeman, individually, and as administratrix of her husband's estate brought separate actions in the Jefferson Circuit Court against the Louisville & Nashville R. R. Co. The cases were consolidated for trial as they were on appeal. At the conclusion of the evidence, counsel for defendant, relying altogether on the validity and application of the waiver, moved for directed verdicts. The motion was sustained and judgment was entered dismissing the complaints.

The Court of Appeals of Kentucky, considering the same question, affirmed the trial court. A petition for rehearing was overruled and a mandate was issued.

Floyd Holeman was employed in the auditing department of the Louisville & Nashville R. R. Co. for more than 29 years. He worked and lived during that time in Louisville, Kentucky. In March 1954 he was temporarily and indefinitely assigned to New Orleans, La. The municipally owned New Orleans Union Terminal Co. was then completing a new passenger station to be jointly used and operated by the L & N R. R. Co. and five other lines under a rental agreement between the city and the carriers. The Terminal Company required the services of several experienced accountants in the preparation of necessary reports to the Interstate Commerce Commission and each of the participating carriers furnished two men. Holeman and Walter Weber were sent from the L & N.

These men were kept on the payroll of L & N and their seniority rights were thus protected. Floyd Holeman was promoted from senior accountant to "traveling auditor",

with an increase in salary. His traveling expenses to and from New Orleans, taxi fares, meals, tips and living expenses while living in New Orleans were paid by L & N. It was understood that he might return to his home in Louisville from time to time during his New Orleans assignment and expenses incurred on these trips were paid. Expenses were not paid for days spent in Louisville.

The expenses actually paid included those incurred on a trip to Louisville in May 1954 and expenses incurred on the fatal trip, including his breakfast purchased on the L & N diner on the morning of July 3, 1954. The New Orleans Terminal Company reimbursed L & N for all salary and expenses paid to Floyd Holeman.

In consideration of his advancement to traveling auditor and assignment to New Orleans, L & N requested an annual pullman pass for Holeman. This pullman pass, especially procured for trips between New Orleans and Louisville, was used by Holeman in connection with an L & N "system pass". This pass and the pass held by Mrs. Holeman were service passes earned by Holeman by reason of his long service with L & N.

These service passes were issued by L & N pursuant to a definite, long established and well known policy of the company. Under this policy, employees with six months service were entitled to "trip passes". Five years service earned a "division pass", ten years, a "system pass", fifteen years, a "joint system pass" for husband and wife. Twenty years earned separate "system passes" for husband and wife. It was necessarily conceded that the system passes held by Mr. and Mrs. Holeman were issued in consideration of more than twenty years service to L & N. (Clarence Burkle - pp. 33-63 - question and answer 20).

Mrs. Holeman was not traveling on a pullman pass but on a half fare order. She paid half pullman fare, a part of

which, under the contract between L & N and the Pullman Company, was either paid to L & N, or reduced to that extent the amount of the pullman company operating deficit which L & N was required to assume.

ARGUMENT

The Court of Appeals of Kentucky was bound by the rule most recently reiterated in the majority opinion in Francis v. Southern Pacific Co. (1948) 333 U. S. 444, 92 L. Ed. 798. This Court is not so restricted.

The dissenting opinion in Francis, written by Justice Black with the concurrence of Justices Murphy and Rutledge, strongly attacks the theory under which the federal law is held to control the validity of waiver provisions on free passes. The dissent reviews Charlestown & W. C. Ry. Co. v. Thompson 234 U. S. 576, and Kansas City R. Co. v. VanZant 260 U. S. 459, and points out that both rest on the doubtful authority of Northern Pac. R. Co. v. Adams 192 U. S. 440, which held that federal courts, in passing upon questions of state law in the absence of controlling state legislation or constitutional provisions could declare the "general commercial law" of a state — a doctrine repudiated in 1938 in Erie R. Co. v. Tomkins 304 U. S. 64.

Section 196 of the Constitution of Kentucky prohibits a common carrier from contracting away its common law liability. The majority opinion in Francis in applying the pre Erie-Tomkins transcendental law rule, in addition to neutralizing in part the Erie-Tomkins decision, actually leaves standing a rule under the repudiated Swift-Tyson doctrine, which had fallen so far as Kentucky was concerned because of the constitutional provision prohibiting contractual waiver of liability.

We will not belabor the conflicting views expressed in the majority and dissenting opinions in Francis. The dissenting opinion ably expresses the reasons why it should